UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555 (JMP); Case No. 08-01420 (JPM)(SIPA)

- x

In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.

Debtors.

- -x

In the Matter of:

LEHMAN BROTHERS, INC.,

Debtor.

- -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

August 23, 2012

10:04 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

ECRO: FRANCES FERGUSON

HEARING re Trustee's Motion for Authorization to sell shares of Navigator Holdings, LTD. and related relief [BI ECF No. 5220]

HEARING re Motion for Authorization to settle certain prepetition derivatives contracts with trusts for which Deutsche Bank National Trust Company serves as indenture trustee and related relief [ECF No. 29611]

HEARING re One Hundred Twelfth Omnibus Objection to claims (no liability claims) [ECF No. 15014]

HEARING re Debtor's Three Hundred Twenty-First Omnibus Objection to claims (amended and superseded Claims) [ECF No. 29293]

HEARING re Motion to establish and implement procedures in connection with omnibus objections to reclassify proofs of claim as equity interests with proposed order establishing discovery procedures in connection with omnibus objections to reclassify proofs of claim as equity interests [ECF No. 29899]

HEARING re Motion to certify a class of RSU and CSA claimants, appoint class counsel and class representatives and approve the form and manner of notice [ECF No. 29256]

HEARING re Three Hundred Thirteenth Omnibus Objection to claims (to reclassify proofs of claim as equity interests) [ECF Nos. 28433]

HEARING re Three Hundred Nineteenth Omnibus objection to claims (to reclassify proofs of claim as equity interests) [ECF Nos. 28777]

HEARING re Motion to certify a Class of RSU and CSA claimants, appoint class counsel and class representatives, and approve the form and manner of notice [ECF No. 29256]

HEARING re Three Hundred Thirteenth Omnibus Objection to Claims (to reclassify proofs of claim as equity interests) [ECF Nos. 28433]

HEARING re Three Hundred Nineteenth Omnibus objection to claims (to reclassify proofs of claim as equity interests) [ECF Nos. 28777]

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P R O C E E D I N G S

THE COURT: Be seated, please, good morning. I'm told that we're going to start with SIPA.

MR. LEE: Yes, good morning, Your Honor. Ken Lee from Levine Lee for the SIPA Trustee. With the Court's permission, we'd like to start with the uncontested matter at the beginning of the SIPA portion of the agenda.

THE COURT: That's fine.

MR. LEE: We bring before you today a motion for an order to approve the sale procedures and termination fee in connection with LBI's sale of shares in Navigator Holdings, Inc. or Limited. We note that the hearing on the sale itself is set before Your Honor on September 19th with objections due on September 5th.

The motion is uncontested. However, I do want to bring to the Court's attention that last night we have been negotiating with LBHI concerning a potential objection that they might have made to this transaction, to the sale procedures order rather. And in an effort to resolve that, we worked very hard to do that, and late last night we were able to resolve that issue with LBHI, as well as with the buyers, Wilbur Ross.

THE COURT: What's the issue?

MR. LEE: Well, the issue in short was resolved I think very reasonably by removing the limited no stock

provision that was in the transaction. And so now, the trustee will be able to actively solicit offers in excess of the offer that Wilbur Ross has put on the table, and that's acceptable to Wilbur Ross as well.

So this morning, we filed a revised stock purchase agreement and revised proposed order reflecting that single change. There have been no other objections raised or filed with respect to the procedures order. So we would respectfully request that the Court enter the order.

THE COURT: Okay. That's fine.

MR. LEE: Thank you.

THE COURT: Is there anyone who wishes to be heard with respect to this?

MR. ARORA: Good morning, Your Honor, Amanjit Arora, Weil Gotshal & Manges on behalf of LBHI and its affiliates.

I just wanted to make one clarification on the record that while we agreed not to object, we have reserved our rights to object at the sale hearing. So I just wanted to point that out for the record.

THE COURT: All right. Everyone's rights are reserved in respect of what happens at the sale hearing and I've reviewed the papers including the supporting declaration from Deloitte and find that the procedures are acceptable and I approve them.

MR. LEE: Thank you, Your Honor. We'll be submitting the form of order later, and if -- with Your Honor's permission, may we excuse the individual who --

THE COURT: He may be excused.

MR. LEE: Thank you very much, Your Honor.

MR. BERNSTEIN: Good morning, Your Honor, Mark Bernstein from Weil Gotshal on behalf of LBHI. The first three items on the agenda this morning are all uncontested items, and there are several R2 related items that we'll get to later.

The first item on the agenda is the motion for authorization to settle prepetition derivative contracts for and between LBSF and certain trusts, for which Deutsche Bank serves as indentured trustee and four between LBDP for which -- between LBDP and certain trusts, for which Deutsche Bank serves as indentured trustee.

As a result of this settlement, LBSF will receive approximately $38 million. LBDP will receive approximately $3 million based on their swaps. This resolves a long lasting dispute regarding these swaps. Certain of these trusts have been retaining cash since the beginning of the case, that they have been collecting, that otherwise would have been distributed to -- distributed both to LBSF or LBDP. The trustee has asserted throughout the case that they had certain defenses to those payments; however, we've

managed to reach a resolution and as a result, these payments will be made to LBSF and LBDP if the settlement is approved.

Daniel Irman (ph) of Alvarez & Marsal has filed a declaration in support of this settlement, and his business interest -- his business judgment to settle is in the interest of the estates and their creditors. In addition, an employee of Deutsche Bank Trust Company has filed a declaration regarding the notices that they have provided of this settlement of the bankruptcy case and of these claims to their investors all throughout the case, and that they have not received any responses or any objections to the settlements.

No objections were filed on the docket and we respectfully request Your Honor enter this order on an uncontested basis.

THE COURT: It's approved.

MR. BERNSTEIN: Thank you, Your Honor.

The next item on the agenda is the 112th omnibus objection to certain claims based on Lehman program securities that had been filed many months ago.

The objection relates to about 62 claims of Banque Cantonale Du Valais that they filed on behalf of various of their customers. Their claims -- since they were based on Lehman program securities, and according to the bar date,

were required to include blocking numbers, which were -- which was a provision of the bar date order necessary to validate ownership of those securities and avoid duplicate payments, as Your Honor may recall.

These claims filed by Banque Cantonale did not include valid blocking numbers, and as a result, we objected and said they should be disallowed for failure to comply with the bar date order. Based on the response from Banque Cantonale that they could establish their ownership and the lack of duplication through other means, and certain statements from this Court with respect to similar matters and similar objections, we have worked with Banque Cantonale over the past several months to see if they could provide us with the adequate comfort that there is minimal risk of duplication of these claims.

As a result, Banque Cantonale, the relevant clearing agency and the individuals that Banque Cantonale represents, have all provided certain declarations and certifications that they have not filed any other claims, any of the claims filed based on these same securities were not filed on their behalf. They have not received -- the first distribution has not flowed through to them through some other party who filed on their behalf, and as a result, Lehman is -- believes that the risk that these claims are duplicative of any other claims is minimal.

And to further protect Lehman, Banque Cantonale has agreed to provide an indemnity to LBHI if it's ultimately determined that any duplicate payments are actually made.

Based on these facts, LBHI is willing to withdraw the objection or resolve the objection pursuant to the stipulation which we filed with the Court yesterday, and allow these claims in the amounts determined pursuant to the structured securities valuation methodologies order, which Banque Cantonale has agreed to as well.

As a result of this agreement, we respectfully request Your Honor enter the stipulation or so order the stipulation that Lehman and Banque Cantonale have agreed to.

THE COURT: I will so order the stipulation.

MR. BERNSTEIN: Thank you, Your Honor. The third item on the agenda is the debtor's 321st omnibus objection to claims.

This objection sought to expunge certain claims that had been amended or -- and superseded by subsequently filed claims by the same party. Deutsche Bank Trust Company filed certain claims based on certain derivative contracts of certain other trusts, not the ones we referred to earlier in the other settlement.

And then following the effective date of the plan, Deutsche Bank filed claims based on some of those same derivative contracts as rejection damage claims. As those

contracts were not on the assumed list. They had been rejected by the plan.

We additionally had believed that the claims were entirely duplicative when we filed the objection; however, after speaking with Deutsche Bank it was determined that there were certain derivative contracts that were on the initially filed claims that were not included on the rejection damage claims, either because they had been terminated or matured throughout the case.

And as a result, the claims were not entirely duplicative. However, to avoid having duplicate claims or two claims on the register seeking similar recoveries, we've added language to the order and Deutsche Bank has agreed, that provides that certain of the derivative contracts that were included on the initial claims will be deemed to be included on the subsequent claims, and the initial claims will be expunged except for those initial certain contracts.

Deutsche Bank has agreed to this language and the entry of the order with that language. I have a blackline of the order to hand up to Your Honor if you'd take a look at it.

THE COURT: I'll take a look at it. And I note Deutsche Bank's counsel is here and may want to say a word.

MR. PEDONE: Your Honor, Richard Pedone on behalf of Deutsche Bank. And we agree the language in the order

addresses the issue.

THE COURT: Fine. Let me take a look at it. This is language that's obviously meaningful only to someone who has actually studied the claim --

MR. BERNSTEIN: I think that's right.

THE COURT: -- history and I accept the language as being appropriate, particularly since counsel for Deutsche Bank has just said so on the record. So it's approved.

MR. BERNSTEIN: Thank you, Your Honor. I will turn the podium over to my colleague, Mr. Miller to handle the RSU section of the --

THE COURT: Fine, thank you.

MR. PEDONE: Your Honor, may I be excused?

THE COURT: Yes.

MR. PEDONE: Thank you.

MR. MILLER: May it please the Court, good morning, Your Honor.

THE COURT: Good morning.

MR. MILLER: I'm Ralph Miller from Weil Gotshal & Manges here for Lehman's Brothers Holdings, Inc., known as LBHI.

Your Honor, the next four items on the agenda are under the heading RSU related matters, because they all arise from objections filed to claims that involve in one way or another, restricted stock units or conditional stock

authorizations. We often collectively call those RSUs, sometimes when it's important to make a distinction, we call the collective stock authorization CSAs. Those are all objections that seek to reclassify the RSU or CSA components as equity.

The Court had directed LBHI to propose a protocol to organize discovery for these claims as a group and we've been working with counsel for a number of these claimants to accomplish that goal. That has led to the -- excuse me, motion for a proposed order that is shown as item number 4 on the agenda. The title of the order is, Order Establishing Discovery Procedures in Connection with Omnibus Objections to Reclassify Proofs of Claims as Equity.

This is proceeding as an uncontested matter, but we understand some counsel for claimants may wish to address the Court on it. I did want to clarify a minor technical amendment to the form of the proposed order, and if I can offer that clarification now, Your Honor.

Briefly, the problem is that identification of claims that rely on restricted stock units for conditional stock authorizations turns out to be an imprecise science. All of those claims are from former employees of Lehman entities and many are filed pro se.

They often include claims for other amounts in addition to RSU or CSA issues, such as unpaid severance or

unpaid vacation. And often it's unclear exactly what they are claiming. LBHI had identified more than 3,600 claims based at least in part on restricted stock units or contingent stock award -- authorizations, more than 3,100 of those did not respond and have been reclassified. That was accomplished in thirteen separate omnibus objections between December 7th, 2010 and June 15th of this year.

After LBHI had worked with counsel for a number of claimants on the proposed order, further review found a small number of additional claims that may be asserting recoveries based on the RSU or CSA component. We're not absolutely certain, but we believe that number is about 21 more claims, which is less than six-tenths of one percent of the claims that have been covered by the other 13 objections.

LBHI intends to object to the RSU or CSA components if they exist tomorrow, and to set that objection for hearing on September 27th.

The technical amendment to the procedures order will allow any of those 21 claimants who do respond to catch up and join the procedures that have already been set up. There will be some adjusted deadlines for them to file a declaration that says they want to participate. But the deadlines that have to do with the voluntary disclosures that LBHI is already making and is posted on the website,

and people are actually drawing on, will be available to them on the same schedule.

Special reports will be still provided to them and the combined document request, they're proposed by the order, and possible depositions, will still proceed as scheduled. So the procedures order comes out at the same place if the -- these parties are allowed to catch up.

So with those technical adjustments, LBHI believes that this unopposed procedures order will provide what this Court called quote, reliable and authentic evidence, close quote, to resolve these reclassification issues.

There is one more point that I do want to note for further reference in the future. LBHI has identified some former Lehman employees who were transferred to Eagle Energy and Barclays, who have filed claims for unpaid bonuses related to 2008.

Some investigation is required on these claims, Your Honor, including whether they were, in fact, paid by their subsequent employer and how much. LBHI is preparing an omnibus objection to assert that those bonus claims should not be allowed at all. In the alternative, with regard to about 80 of those bonus claims, I am advised that LBHI anticipates taking the position that if the claims are allowed, some portion of those bonus based on historical patterns, would have been granted in the form of RSUs or

CSAs.

And so there may, in the future, be some RSU or CSA claims that come into the case that we cannot now fully anticipate. We don't believe that it's productive to delay this order to get that worked out. And we don't believe those claims will be processed in the same way. They have somewhat different issues. But I wanted to make the Court aware of the fact that we can't represent that there will not be another RSU claim that will darken your door after we resolve this group one way or another. But we do believe that the vast majority of the RSU claims and CSA claims, and those, that it makes sense to treat as units will be swept in by the procedures order.

And so with that clarification, Your Honor, and extended explanation, which I appreciate you indulging me with, I move for approval of the procedures order. We will submit a revised copy with the numbers filled in after the hearing to the Court. And I would like to allow any of the representatives of claimants who have previously indicated they would like to address the Court, to speak to the Court at this time.

THE COURT: Okay. Fine, thank you.

MR. ABRAMOWITZ: Good morning, Your Honor, Steven Abramowitz on behalf of Lisa Marcus.

I've been involved in the process with Weil Gotshal

as well other counsel in connection these procedures on discovery. I would say it is an imperfect but workable process for those who are represented by counsel. This is modeled after the discovery procedures that were done in connection with plan confirmation, of which a number of us are familiar with. And I'm basically comfortable with this on behalf of my client.

I would say, though, Your Honor, that I am concerned that given just a large number of pro se claimants involved in this, and the fact that a lot of them are not represented by counsel, of course they're not, that we had suggested to the debtors that they do something different than a regular litigation process for these claims.

I mean, we had suggested some kind of mediation process or something that has been done in other cases with respect to, for example, personal injury claimants that was not acceptable, but we also suggested was perhaps just with discovery, if it was the debtor's position that we did need to go through regular discovery, that there be some kind of master or discovery facilitator to help coordinate responses, coordinate discovery requests, make sure there's no duplication, and bring a little bit more order to the process.

The debtors were not comfortable with that, so here is where we are. I did want to voice, though, that I'm not

a hundred percent certain that this order will bring order, total order to the process just because of the nature of the claims and the nature of the claimants. But for those represented by counsel, this is workable and we're prepared to move forward. Thank you.

THE COURT: All right. Thank you.

MR. MICHAELSON: Good morning, Your Honor, Robert Michaelson. I represent four of the RSU claimants. And I echo what Mr. Abramowitz said. This is an imperfect procedure, and we understand the necessity of gaining factual information necessary to make an appropriate determination.

The underlying concern that my clients have, and I believe this is a concern that other RSU claimants have, is that the process is structured, as well intentioned as it is, in such a manner that the time and the expense that we will be going through will ultimately convince people that perhaps maybe they ought to drop out of the process.

Now, I'm not asking the Court for -- to address this in the form of saying that it should be shortened. I'm not asking the Court to come up with any sort of remedy for this. But I am expressing a concern that the process is going to be lengthy enough that the time and the expense is going to ultimately defeat these claims. Because we don't represent -- we're not represented by a single counsel,

because we're not a committee being paid by the estate to do this, which may not even be appropriate, this is an issue that I think needed to be expressed.

And at some point during this process, my clients may instruct me to come back to the Court or to address Lehman's counsel to see if there can't be some way to shorten the process. Because as the saying goes, justice delayed is justice denied, and that's the concern ultimately that my clients have.

THE COURT: Do you have a sense as to how prolonged this process is going to be and obviously you're only speaking from the perspective of your clients, and also how costly it's going to be, again from the perspective of your clients?

MR. MICHAELSON: Your Honor, unfortunately we don't. I only know from experience in bankruptcy litigation over many years and looking at the complexity of these issues, that I could imagine a prolonged process with multiple depositions that go on for an extended period of time.

I would like to be able to give you a more precise indication of what I thought that would be. I'm really reacting to once again experientially what I see as happening here. And I can't say it's going to be a three month process or a six month process or a one year process,

or how many depositions will be involved. But I imagine it being extensive and costly and ultimately in that sense, defeating some of these claims essentially through attrition. And that is a concern of my clients right now.

THE COURT: Okay. Thank you for that.

Anyone else wish to be heard at this point?

MR. KENNY: The two attorney -- good morning, Arthur Kenny, pro se, and I'm a commission salesman. And the two attorneys mention the fact that there are several people that are pro se commissioned salesmen. My claim represents commissions that were earned, withheld, but never converted into RSUs, so they were held aside. And I've submitted supporting documents to that effect.

I'd just like to know how to proceed. I believe Your Honor had mentioned that there would be different classifications, one of which was the commission salesmen in a prior hearing, and I'd just like to hear how I should represent myself properly in that. I have already submitted supportive documents that I have regarding the statements, so.

THE COURT: All right. Mr. Miller, I'm going to ask you a question because I'm not in a position to respond from the bench to this request by a pro se commissioned salesman as to how he should conduct himself in reference to a matter that seems to go beyond the discovery order that's

before me at the moment.

My impression from the question you've asked, is that you're asking for guidance as to how to approach this issue of claim resolution from your perspective, as opposed to discovery in connection with the RSU and CSA matters that are before me. And so I guess a question that I have for Mr. Miller is apart from the discovery procedures that are front and center at the moment, has any consideration been given to how the estate will be dealing on a claimant-by-claimant basis, in an effort to reconcile claims and potentially reach agreements with regard to the claims.

MR. MILLER: Ralph Miller, again, Your Honor. Yes, we have. And if I might explain how the procedures have been set up. There are classes or categories of claimants and those include a commissioned sales category. There's a division generally between those who were originally from Neuberger Berman and those who are not. So there's a category.

There are some lawyers working on that, and there is a procedure for pro se claimants to file a notice of intention to participate in the discovery. It does not require a lawyer. We've actually received a number of them, and my colleague, Ms. Alvarez has received a number of calls from pro se claimants. And the short answer is that if he'd like to partake of the discovery process, he can file that

notice. It doesn't necessarily require him to do anything, except submit the notice at this point.

I would point out to the Court that LBHI does not think any discovery is needed. The discovery has been requested by the RSU claimants, and we are responding to the Court's directive to make discovery available.

So that the way the procedure is set up, there is a website, log ins are provided, and certain common documents are available for download. And that's been operating and people are getting things like the contracts and agreements.

A special report is going to be prepared for each claimant who has responded and has filed a declaration that tells them certain basic information on what LBHI shows for their own records. And that's not available to everybody. In other words, it's an individualized report. Your log in will give you that information.

So he can participate in that process and see what is there. The rest of this procedure is basically derived from the manual for complex litigation which says that when you have multiple claimants with common positions, that the Court can direct that they file combined discovery responses and so on.

If he wishes to participate in that process, he can contact some of the attorneys, who would be happy with their permission, I know some of them are here and on the record,

to let him know. And he can submit whatever input he may have into that process.

We do anticipate that we will consider and discuss any sort of settlement overture that we receive from individual claimants, from group of claimants, from anyone else, and that we will be prepared at the end of this process to try to find a way to resolve it, if it can be resolved, if not, it would come to a hearing, Your Honor.

The proposal for a facilitator, administrator, or something else which I might address, was a proposal that LBHI pay for a facilitator or administrator. LBHI doesn't care whether the claimants want to pay together for some sort of a facilitator or administrator, and if the pro se claimants want to go together and hire a lawyer or somebody to help them or something else, that of course, is up to them. We don't believe that's necessary or that that's appropriate, or it has not been done in this proceeding or in any other situations, even though it's been proposed before.

So we think the pro se claimants under the mechanisms that have been set up, can get the log in, they can get the information. If they are called upon for discovery, and frankly LBHI does not expect to be taking discovery from people unless they are raising individualized issues, and we feel we need to clarify, in which case it's

possible we would need discovery. But basically a pro se claimant ought to be able to file that and their -- they can participate in discovery.

If they don't want to participate in discovery, then they will receive service of all the pleadings, and like any other pro se matter, they'll get notice of any hearing, and they'll be able to appear and deal with it like any other pro se claimant would.

So we believe that the mechanism exists. It's always difficult, as the Court knows, to navigate a procedural system without the assistance of a lawyer. There are, of course, legal aid clinics and others who would probably assist if people wanted to go approach them. But we are hoping to talk to people, but we obviously can't give them legal advice. I hope that responds to the Court's question.

THE COURT: It is responsive and helpful. But as long as you're at the podium, let me ask you a follow-up question about the process, following up on something that I discussed with Mr. Michaelson. And that is, can you reasonably project how long this process is likely to take during the discovery phase, and when these matters may be ripe for determination?

MR. MILLER: Yes, Your Honor, we can. The -- for one thing, the discovery phase might be truncated if certain

aspects of the discovery are unnecessary. As is customary, there's a document discovery phase, and that begins, as we say, would amount to voluntary disclosures or automatic disclosures by LBHI. They are generalized and available to anyone who signs up for access, and then there is a protective order as well that needs to be returned, Your Honor, which is a standardized protective order, because some of these things have -- there may be confidential information about individuals including -- although we're going to try to redact social security numbers and other things, it's possible that some of those might come out in depositions and at other times.

The document discovery phase, Your Honor, takes us into early next year. There is a provision for a 30(b)(6) deposition of LBHI and for depositions of individual claimants. I personally am hopeful that that phase actually will never happen. Because I don't think that's going to probably be necessary, but assuming it does happen, and you went all the way through the procedure, it would take us to about June of 2012. And then the document discovery and --

THE COURT: You must mean 2013.

MR. MILLER: I'm sorry, June 2013, excuse me, Your Honor, June of next year. And the discovery would then be essentially complete, and we should be able to submit anything that's left over at that point, maybe things have

been resolved or not to the Court for a hearing.

THE COURT: Okay. Thank you. Are there any other --

MR. MILLER: And, Your Honor, I think in responding to those questions, I did answer the issues that were raised before. We have tried to be, and will continue, as we believe we are supposed to be, cooperative and take into account special situations. But we do believe that it's necessary to move this in an orderly fashion. There need to be some deadlines for people to work against, which is --

THE COURT: Okay.

MR. MILLER: -- what this established.

THE COURT: Is there anyone else who wishes to say anything about these procedures at this point?

I don't hear anything more. I've reviewed the proposed procedure as including the new form of proposed order that was posted on the electronic case filing system last evening, both in a clean and blackline form. And I believe that these procedures represent an appropriate way to move forward in dealing with issues relating to the classification of the RSU and CSA based claims.

And I'm available to the extent that there are discovery issues that arise in accordance with these procedures. I hope that won't happen, but I am here. And I'm particularly sensitive to the difficulty that

individuals who do not have counsel may have in navigating the documents and the discovery and making sense out of what's being presented.

And would simply note that the proof of claim process is one that by its very nature is focused on pro se behavior. There's nothing about the filing of a proof of claim per se, that requires counsel. Each individual confronted with what is now a contested matter, has an individual choice to make, and that is, whether to proceed on their own, or to engage counsel, either individually or collectively. That's a choice that arises in virtually every bankruptcy case. This just happens to be a particularly large one.

So those problems are typical of bankruptcy case administration, and involve individual choices made by each claimant. I do believe having reviewed the procedures, that the procedures are fair and understandable. And are calculated to protect the interests of all involved. I approve them.

MR. MILLER: Thank you, Your Honor, for your time and for your suggestions.

Your Honor, I believe the next item on the agenda is a motion for class certification and we would call the movant, if he would like to begin with his presentation on that and we'd like to respond.

THE COURT: Okay.

MR. SCHAGER: Good morning, Your Honor, and thank you for the opportunity to be heard. I'm Richard Schager from Stamell & Schager. I've appeared before you before. I'm here with Andrew Goldenberg of my firm. We appear for McCully and -- Mr. McCully, Michael McCully and Michael Mullen on the motion for class certification. We also represent approximately 37, based on recent correspondence might be 39 claimants, with respect to the other -- with respect to the 313th and 319th omnibus motions, and two of them with respect to prior motions. I have --

THE COURT: So how many -- just so I'm clear on this, how many individual clients do you represent?

MR. SCHAGER: Right now, it's 37, Your Honor, with ten of those being salary bonus people, six of them being commission sales people, all based in the U.S., and about 20 people from overseas. I get calls quite frequently, two more this week, two last week, of people who want to get involved. I'm not sure if it's feasible to get them -- for two of them, I'm not sure it's feasible to get them involved at this point. For two others, they have oppositions submitted, timely oppositions submitted, and they might -- they have said they want to retain my firm, so that would take us up to 39.

THE COURT: Okay.

MR. SCHAGER: Your Honor, there are two central points I wanted to cover, that I think are probably what the Court wants to hear, and that is the timing of the motion and whether it would cause any delay in the proceeding. I have a couple of other points to make, but Your Honor can guide me in any way you like with your questions.

At one point, I'd like to note at the outset, however, is that there was a revised agenda submitted late last night. The initial agenda did not record the two oppositions we had submitted to the 313th or 319th omnibus objections. I raise that in the context of class certification, because the class certification brief really depends on the opposition to the 313th omnibus motion for its statement of facts.

There's a corrected agenda submitted with the proper docket numbers, but of course, the Court and your staff might not have seen it.

Your Honor, my firm has been involved in class certification issues for a number of years. I've had, it seems to me, class certification issues that are considerably more complex than the one we're facing right now. The beauty of the procedure here, is the fact that you don't have the individual issues that often cause Courts trouble. By that, I mean, there's no issue requiring an investigation of the scienter, of the debtors, there's no

question of individual reliance. There's no need to look at the materiality of omissions, as a reliance substitute. There are no intervening causes that have to be addressed.

Like the doctor who implants a defective device, but there's an issue of whether his advice was also defective and contributed to the damage. None of those issues are present here. It's really a very simple issue revolve around documents. The dominant documents are the CSA, the contingent stock award agreements and the restricted stock unit agreements. They're contractual.

There might be some side issues dealing with the accounting and tax treatment, which I think are significant, but once again, they will be addressed by the documents recording that treatment. Overall, it's a very neat and tidy class certification procedure. But there is the issue of timing, why not sooner.

And I would address that, Your Honor, as follows. I think the Court will recognize, and I think debtor's counsel has effectively briefed that class certification procedures are somewhat unusual in the context of a bankruptcy proceeding. They can certainly be used. I think the best opinion is the American Reserve opinion, where there's analysis by Judge Easterbrook and Judge Posner talking about the benefits of class certification and how they can be used in a bankruptcy proceeding.

But I recognize it is unusual. Why is it unusual? Because the procedures are all set up to give individualized notice. Theoretically, there's a procedure for consolidation. There is an opportunity to be heard, and the damage issues I think are pretty straight forward. Centrally as debtor's counsel says, there's supposed to be an opportunity to pursue your claim at a minimal cost, and I think those are valid arguments, and I think they excuse not making this class certification motion at an earlier stage.

I think what we've discovered in our investigations, Your Honor, is that those factors are simply not applicable here. And that's what we've learned from the oppositions we developed to the 313th and the 319th omnibus objection.

First of all, there's the notice issue. Your Honor has on the record now affidavits from two people saying they were never served with prior objections, and they have not moved, there's no reason for not service, they just were not served. Two percent is out of 30, you know, we're talking about a potentially six percent of the class where service was defective.

And I think Your Honor knows from prior affidavits on the service of the proofs of claim where you're -- you had very specific procedures set up for how those proofs of claim were to be mailed to claimants to complete. And

there's also an affidavit, a very recent one, talking about a very detailed service of process for the discovery procedures order. But the description of the service of the notice is a bit sketchy in the record.

Second of all, I think the notice is defective in substance, and you've got Robert Sargent's (ph) affidavit as part of the record, too, where he read the notice, and he's not the only one who was just -- I could reach him for an affidavit, he's one who said, there's no indication in the notice that reclassification means I get nothing.

Now, regardless of what analogy you draw, and regardless of the complexities of bankruptcy procedure, it doesn't take an awful lot to say seven or eight words, if you are reclassified, you will get nothing. And that never appeared in any of these omnibus motions and I think it should've been.

Consolidation, Your Honor, the best analogy I can think of is that this is like running down the herd and killing off the weak. The people who are dropping out are people who can't afford to hire counsel. They're intimidated by the legal process, they don't understand what it's all about, or people like Mr. Sargent, who get a notice that doesn't indicate that anything drastic is going to happen, it's just a reclassification procedure.

But there are people out there, and I think we have

to remember that these are the people who built the value of this company that's being drawn down. They are not getting adequate disclosure, and there's really no meaningful consolidation here. The people who have been forced to drop out because they can't afford to hire a lawyer, or because they're overseas, or because they have language difficulties, because they're calling from Germany or Hong Kong or Japan, these are the people who are not getting the benefits of consolidation. I think there's a question of whether there's a meaningful opportunity to be heard.

But the other thing I'd like to focus on is the cost. And for this, Your Honor, I direct you to McCully's affidavit in support of class certification. Because of what he had to go through with a modest size claim. He is not one of the 5 or $10,000 claimants who are most of the people who are being squeezed out at this point.

He's got a claim in the high six figures, so it's worth paying attention to. It's by no means the largest of the claims that I'm dealing with. But McCully submitted his opposition, he had submitted an opposition to a reply. His opposition was misplaced, and he was mistakenly included in an order reclassifying his claim. He had to deal with the Court and the U.S. Trustee and debtor's counsel to get his claim restored. That was all in connection with the 130th omnibus objection. And then he was served with the 313th

omnibus objection which was the exact same claim number.

So where's the reasonable cost there? He's required -- he's been required to go through hoops to maintain his claim. And I don't think that's an unusual -- and under these circumstances, Your Honor, and again, I refer to the economic analysis done by the Seventh Circuit, Judges Easterbrook and Posner, the bankruptcy courts, as they said, should employ the class action device when necessary to ensure that it makes the awards justified by non-bankruptcy entitlements. It's a twenty-four year old case, but it was recently cited by Judge Rakoff and is still valid law. Judge Rakoff's decision was the Ephedra Twin Labs decision.

The second question I wanted to address, Your Honor, was will it delay or in Judge Bernstein's phrase, gum up the works of this proceeding. The discovery procedures order contemplates a year's worth of discovery. I acknowledge Mr. Miller's point that it was not Lehman Brothers who wanted the discovery, but it's clearly an exhaustive process, and we don't have to address whether the depositions are necessary. It's still going to take the six to nine months that I estimated at an earlier hearing, not the two to four months that the Court was initially advised by Lehman it would take, in which case it would've been over by now.

There is really no indication that there's going to be any type of delay. The class consists of somewhere in the range of 220 people, depending on how these most recent numbers worked out. I think the fact that there are additional claimants that have been located, those are people who are not going to have a voice, because as a practical matter, the Court's decision on these pending motions now is going to govern them.

They ought to have a meaningful voice and I think it's adding 220 -- a small class of 220 people is not going to delay the proceeding. I emphasize again, Your Honor, that these are employees, these are former employees. That ties into the disclosure issue and what they had a right to expect from their former employer in terms of summarizing what the effective reclassification would be, but it also has to deal with the value being distributed here, which is value that they built. These are not people in the position of outside tort claimants, like Judge Rakoff addressed the Ephedra Twin Labs case.

These are people who built the value and I would go back to a point that I've tried to make in the briefs. If you go back to Section 510(b)'s legislative history, which the world knows was based on the article developed by Professors Slain and Kripke. In three places in their article, they emphasize that the reason securities claimants

should be subordinated is to help protect the interests of employees along with other general creditors. That's a different concept that we're hearing here. And I don't want to get into the substance because it's not the subject today of whether the IRS uses CSAs as securities. Your Honor knows from the fact that I'm here, that I am convinced they are not.

But the thing that has to be considered is that we're dealing with employees here that Slain and Kripke both contemplated as a protected class, they were to benefit from 510(b), not to be punished by it.

THE COURT: Let me ask you purely a procedural question unrelated to issues of entitlement. And it's a very simple problem I'm having with your motion. In the ordinary course of the interplay between class action procedure and bankruptcy procedure, an individual or individuals who purport to represent a punitive class have filed proofs of claim prior to the bar date, not only for themselves, but on behalf of others who have not filed proofs of claim.

That is the standard in which, at least in my experience, class actions intersect bankruptcy practice. But here things are different. Here each and every claimant that would be part of this proposed class has already filed a proof of claim in his or her name by the bar date.

MR. SCHAGER: That's correct, Your Honor.

THE COURT: Inasmuch as we already have a set of well established procedures that govern the management of objections to proofs of claim, including the reclassification issues that are presently being discussed, what's the advantage in adopting class action practice for something that doesn't appear to require it?

MR. SCHAGER: I think the advantage, Your Honor, is the protection and the assistance granted to exactly the kind of person the class action device was intended to protect. That's the person with the 5 or $10,000 claim who can't even look at the expenses, let alone legal fees for trying to pursue that claim and he's being deprived of his compensation simply because he can't afford to do it. I think it also protects the -- I mean, we've sat in your courtroom, Your Honor, and watched how the legal process can intimidate people who are professionals in New York, who have some familiarity with what the law is all about. And we've seen some fairly dramatic presentations where people got extremely upset.

You cannot underestimate how intimidating the process is, and when you start dealing with people for whom it's a second language, I think the process is just overwhelming to them. Again in the context of whatever the size of claim might be.

THE COURT: Well, let me ask you a slightly different question, but it really has much the same focus. In the Lehman Brothers, Incorporated SIPA case, there are various legal matters that have been presented to the Court for determination that have not arisen in the context of class action practice, but in which various kinds of claimants have joined together for what has been termed, test cases, in which certain questions as to whether or not certain kinds of claimants qualify as customer claims have been litigated.

MR. SCHAGER: You're referring to your TBA decision, Your Honor?

THE COURT: That's one example.

MR. SCHAGER: Yeah, uh-huh.

THE COURT: But there are others as well. But the law of the case, in effect, drives outcomes. And so in this instance, we have different categories of individuals who have RSU, CSA type claims. The $5,000 claimant, to use your example, might well choose as a personal matter, to do nothing, other than have his or her objection lodged to reclassification, and stand by and watch you acting on behalf of 39 clients who have engaged you to be their counsel, to argue the facts on the law.

Once you argue the facts on the law with respect to your clients, and others do the same, and there are

different lawyers who are here representing different claimants who are either similarly situated, or at least on the wrong end of the same objection, so they have something in common, but they will be presenting presumably all the legal arguments that I will need, assuming discovery has run its course some time next year, and I'll be deciding the legal question presented in the omnibus claim objections.

Once I decide that legal question, isn't it just decided regardless of whether or not a class action has been accepted under Rule 23? I will have determined one way or the other the legal issues that are in dispute, and that will determine the outcome of the claims. Why do we need a class action?

MR. SCHAGER: Your Honor, the test case concept is a very valid comment. And that could be an alternative way to pursue the matter. However, the class action -- and you're right, the class action is only pleaded for people who have filed proofs of claim. But it's also pleaded for people who receive the objections are overwhelmed by them, and due to their cost benefit analysis, and decide I have to give up my compensation claim because I just can't afford to pursue it.

Now, the test case scenario would protect them if the omnibus objections are held in reserve or denied with leave to replead at a later date, but it's not going to

protect them if there's a charge submitted dismissing another 220 people because they weren't quite sure how to respond to this omnibus objection.

THE COURT: Well, let me ask you a question in reference to that last comment, because I'm finding this a little bit both confusing and troublesome.

Do I understand that if your motion for class certification is granted, the parties who have not opposed the omnibus objections number 313 and 319, will end up getting the benefit of the objections that have been filed by your clients as class representatives, and in effect, will be overriding a procedure that has been applicable in this case since the very first omnibus claims objections were filed several years ago.

Because if that's what the impact of granting class certification would be, it would turn everything that we have done in this case for years on its head. How could that be fair?

MR. SCHAGER: I think I would say Your Honor is -- I don't need a class certification for the 37 people for whom I've entered individual affidavits. The class certification motion is clearly intended for the protection of the 220 who did not enter oppositions because they were intimidated by the process or because their cost benefit analysis said to them that I can't afford it.

THE COURT: But see that would effectively override not only the procedure that has applied in this case from the very beginning, but the procedure that applies in virtually every Chapter 11 case, large or small, in which trustees or debtor's in possession or plan administrators, as the case may be, file objections, omnibus objections being permitted under the bankruptcy rules against parties who have filed proofs of claim seeking to disallow those claims or reclassify those claims. And in the ordinary course of case administration, since all that's required is notice and a hearing, anyone who doesn't appear, who doesn't say anything, loses. That's how the system works. That's how it's designed to work. It's efficient that way.

MR. SCHAGER: Your Honor, you won't be surprised that I did not come here today expected to hear anyone say thank you. But there's no doubt in my mind that a year from now, the Court will realize that class certification is the right thing, whether you grant it now or whether you don't. A year from now, I think the Court will realize that it was the right thing to either have done or should've been done.

Yes, I recognize what's happened for the prior 11 or 12 motions. And the Court knows from my last experience here, my last appearance here, that I don't think it was fair. I have tried to be as fact intensive as I could on this motion, pointing out why notice is inadequate, why the

consolidation procedure is defective, why the economies of scale are not being achieved. And I think it's a fact intensive inquiry, but I think it justifies certifying this limited class.

I am not addressing the prior 11 motions, but if the -- whether they were handled correctly or not, I mean, in terms of the dismissal of the people who didn't enter objections, then that depends on things like adequacy of notice, and whether the notice properly explained what the significance of a non-opposition was.

That doesn't change the fact that we're looking forward at a class now that is going to be treated unfairly in the absence of certification. Obviously that's my view, but that's the position I advocate. I don't think it's fair to dismiss these claims, because I know -- I've talked with enough people to know why they're not submitting oppositions.

And I think it's unfair for them, these are compensation claims in my view, and we'll get to that some day. But these are people who are afraid to pursue their compensation claims because of the cost, because of the intimidation by the process, because they just can't devote the time to it, because they're not getting the benefits of a group proceeding. But they could participate in a group proceeding.

I understand your view, Your Honor, it's troublesome. And I sometimes wish that I could've started with the 130th omnibus objection or one of the earlier ones. But we didn't have the facts then. We didn't know that the process was not working properly. We do know the process is not working properly now, and I think that justifies changing the practice looking forward.

THE COURT: Okay. I hear what you're saying, and I have yet another comment to make.

And it has to do with what I'm going to call disparate treatment. If we have 14 omnibus objections, 13 of which having been filed from December 7th, 2010 through June 15 and the last one having been filed apparently last evening, and we have a procedure such as the one that you're proposing in reference to objection 313 and 319, that means that we have, through your efforts, created a protected class that is indistinguishable from the thousands of other RSU/CSA claimants that chose not to interpose any objections to the omnibus objections and whose claims have been reclassified.

In what way is it fair for a subset of similarly situated claimants to get the benefit of what amounts to a class that protects them and for a vast majority of others that went before them in the last couple of years to be simply out of luck?

MR. SCHAGER: Your Honor, I could give you the mirror image of that very question I think, as expressed to me by a number of claimants, both in the two recent motions and in prior motions.

And that is, well if the Court permits so and so to recover on his compensation claim, surely the Court would not give him an award just because he can afford a lawyer and deny me an award because I can't. I think that's really the mirror image of what you're saying from the claimant's point of view. The expectation is that there's a legal principle here.

That aside, I think the question presented is given the facts that appear now, is it fair to these people to deprive them of their compensation claims because of what was done in the past. And I think the answer to that is no, the fact that things were done differently in the past doesn't justify depriving you of your compensation claim now.

But I'll take one more clause to that, if I could, Your Honor, or one more sentence, and that is this, you know, I've deal with complicated class action issues with bigger classes. The most we're talking about here is a class of 3,600 people. If the -- what's the bankruptcy phrase, the opening of the flood gates, right. If the flood gates were opened and people came back, or maybe the Court

takes a look at disclosure and decides that, you know, maybe it really wasn't adequate, maybe we should -- I know Your Honor's reaction to that, you absolutely do not want to do that, and that's fine.

But if it were to happen, the most you're talking about is 3,600 people. That is not a huge class, it's not a huge administrative difficulty, and it's not a time consuming procedure to handle it. But I think the central point I have to make in the context of this motion and today, is the fact that we're not talking about the 3,000 people whose claims have been converted to equity right now.

THE COURT: Well --

MR. SCHAGER: We're talking about 200 people who are going to be converted to equity unless there's a test case basis or some class certification procedure.

THE COURT: Well, with respect to your math, there's a problem created here that goes well beyond the approximately 3,600 claimants that have claims based upon RSUs. The hundreds of omnibus claims objections that have been filed have all been administered on the same theoretical basis. Namely, claimants who filed proofs of claim are entitled to notice and a hearing.

If after notice those claimants fail to respond, their claims are disallowed or reclassified on an uncontested basis. We're talking hundreds of millions of

dollars of claims. Maybe billions of dollars of claims. We're talking about a system on the basis of which interim distributions have been made, including the $22.5 billion interim distribution that was made last spring. There's another one due in October.

Everything that has been done in this case administratively assumes, as it must, that the parties in interest will act on their economic interest, whether they have lawyers or not, if they have an objection to lodge, they'll do it. If they make the judgment not to do it, they are out of luck.

And so from a case administration prospective, it seems to me that what you are proposing is abhorrent.

MR. SCHAGER: I'm afraid I've been accused of worst, Your Honor. I'm sorry that it's abhorrent. But, you know, the flood gates argument is commonly --

THE COURT: That's the argument.

MR. SCHAGER: Yeah, the flood gate, as it's commonly used, it's always going to -- the flood gates are always going to open. And I take exception to it in two ways. The first is, we're talking about 220 people. And you know, the Court has prior orders that are entered, you had an opportunity, and you didn't even object to the order, even after you understood what reclassification meant, okay, although -- but the other side of it is that, and again I've

tried to be as fact intensive as possible in these papers with supporting affidavits.

I don't know what notices were given, what opportunities to object to oppose an omnibus objection. I don't know how that disclosure worked. I have to assume that because it was done in this court there was adequate disclosure. But I think with respect to these people and this situation, as documented in the affidavits, the disclosure was not adequate. And did they have an opportunity? Again, I rely on my summaries of my own conversations with people, and also with the affidavits that I've submitted, disclosure here did not tell people reclassification means you get nothing.

And I think in most of the claims you're talking about, Your Honor, you're talking about people who have substantial resources. And on top of that, there is the factor that never gets mentioned anywhere in these papers, in these so-called security holders, that you're talking about people who were employed by this company and built the value that's being distributed.

And I think their entitlement is a little different because they built what's being paid off to other people. I can't -- yes, I understand the problems. That's part of the process. And all I can say is, we're not talking about 3,600 people today, we're not talking about thousands of

people today. We're talking about 200 people.

And I don't think the Court is going to be damaged by making a fact intensive analysis to say these people deserve to be recognized in some representational capacity. In the absence of that, Your Honor, and I don't want this to slip through the cracks, so I'll put it in abruptly here. I think if the Court denies class certification, given that we've now discovered another 20 plus people to whom notice has to be sent, I think the other 220 people in the 313th and 319th ought to be given a couple of more weeks to enter their oppositions because of the recent extension that has been granted or the recent adjournment that's been granted on the hearing on that -- on those objections.

THE COURT: Okay. Thank you. Mr. Miller, do you want to respond?

MR. MILLER: Thank you, Your Honor. Yes, Ralph Miller, thank you, Your Honor, I do want to respond.

The Court has, of course, already identified the central issue, which is what is the benefit of overlaying class procedures and creating a completely different approach for these people that Mr. Schager happens to want to put into a different classification.

As the Court knows, the purpose of a class action is to promote fair, efficient and cost effective resolution of disputes with a large number of parties. In this matter

because of the situation that exists with all of these claimants, that will not be the result. None of those goals will be promoted because of two sort of salient facts, Your Honor, or maybe three.

First of all, all of these claimants are former professionals with Lehman. We're not talking about low level employees. Most of them, I understand, were vice-presidents or managing directors. The idea that that level of an educated individual does not understand that reclassification to equity has severe consequences. It's just not a reasonable position to take.

They are all people who managed to file proofs of claim as the Court noted. We're not talking about a consumer class out there who may not understand what rights they have or what the wrongs are. And the process has gone a long way at this point, Your Honor.

Now, the Courts have created a number of questions to ask, particularly in the bankruptcy context, to try to see if the class action is going to be a positive thing or a negative thing in the bankruptcy context. And as Your Honor has noted before, Rule 23 should only be sparingly applied, your term, in Chapter 11 cases, because quote, the bankruptcy process itself allows for a multitude of claimants to have their claims heard and determined by a single court under these circumstances, a class action is an

entirely unnecessary and inappropriate procedure. That's particularly true for this very belated effort to tag a class action on to something that has already worked well.

I also need to stress to the Court that the response to the objections that we have been accepted, particularly from pro se claimants can be a single line letter. We are not talking about something that is complex or difficult, and the procedures that we have just discussed with the Court and the Court has approved continue that to make it very user friendly frankly for pro se claimants to proceed. Again, bearing in mind we're talking about former professionals who used to work for Lehman entities.

Now, the Court had a similar sort of issue presented to it when Mr. Kramer wanted to come in late and the Court noted that all it took to get a ticket of admission to that particular ongoing litigation was something that one could classify as a real objection by electing not to object, Mr. Kramer has waived the right to get back in.

That is the central mechanism that has worked here, and we believe is reasonable. We do have in the courtroom today, Your Honor, a representative of Epiq who the entity that provides notice. We have a proffer, and we are a proffer and we are prepared to show to the Court that despite the two declarations that were mentioned, Epiq's

records show that notices were mailed to the correct addresses for these individuals, and that no indication of non-receipt was received.

Whether these individuals threw them away as junk mail, whether these individuals didn't get them or whatever may have happened, the presumptions in this circuit, particularly at a bankruptcy, are that mailing is received. And if you can't follow that presumption, you really can't administer a case of this type. It is, of course, possible for people if they're particularly concerned to monitor the docket and to figure out what's going on even if they don't get notice. Although I realize that would be a substantial burden.

If I might briefly just for the record, Your Honor, I would like to go through the analytics and I'll try to be quick with that. As the Court knows for a class action to proceed in a contested matter in a bankruptcy case that is not an adversary proceeding, there are three requirements that must be met.

First, the bankruptcy court exercising its discretion, must direct Bankruptcy Rule 7023 to apply. Then the claim must satisfy the requirements of Federal Rule 23 itself, and finally, the Court has a general override to determine whether the benefits of the class action would be consistent with the goals of the bankruptcy.

As it happens, there are a series of questions as I said, that the Courts have designed to try to atomize this analysis. The answer to all of those questions is no with regard to the benefits that a class action might bring here.

I'm going to skip over the issue of whether Mr. Schager has made the necessary motion under Rule 7023 and whether he has filed the appropriate certification because I think although we think he has not, and we think that's covered by the rules, we think there are far more substantive reasons and questions about whether the purported class counsel has checked all the boxes to go forward.

The -- one of the key questions that the Courts ask with regard to 7023 is whether the movant sought certification at the earliest practical time. Here, the motion for class treatment is about 45 months after the commencement date, and 33 months after the bar date.

If someone had come forward before the bar date, as the Court referred to earlier or after the bar date and had tried to make a showing that there was some inadequacy in the Court's procedure that was going to create a great deal of momentum in history, that might be timely. There is no way at this point that this motion can be timely.

But also I point out this motion is in a very unusual form that's really inadequate for a class action.

Normally there is a class action complaint and there's somebody who has that complaint as a class representative, and they want to act on behalf of others, it might be a claim.

Here, what Mr. Schager did is not to adopt a response, but to simply say he wants to represent a class of people who haven't filed any responses yet. And we've said, people have different responses. And a very significant point, Your Honor, is that he doesn't have any client that is typical of the class of people who did not respond. All of his clients have responded, some of them responded late, and because they came to us, as was our practice with others, if they had a reasonable explanation they got here before the hearing, we accepted the late responses.

But he has an antagonism in his class that between the people who have responded who said yes, we want to take it, yes, we want to play, and the people who have not responded. And he doesn't have anybody in the class of people who didn't respond to be a class representative.

So on its face, this is an inadequate set of facts to support class certification. And that, I think, is related to this timeliness issue. Because if he had moved in a timely fashion perhaps he could have claimants that would fit.

A third factor the Court said look to is whether to

-- upon whether to apply Rule 7023 is whether the class was certified prepetition and whether the class was given adequate notice of the bankruptcy case and the bar date. Here, there was not a prepetition class certified, of course, and here all of these claimants did receive notice of the bar date because they filed claims before the bar date. And as I've said, we have noted evidence that we're happy to provide. But the purpose of a class action is not to cure some sort of a notice issue. If there's a notice issue, that's something that needs to be addressed in another way.

This is actually, Your Honor, an effort to short circuit the showing of excusable neglect that would normally be required by Bankruptcy Rules 9006(b)(1) and 9002(4), which would be the mechanism for someone who said I didn't get notice and I needed to come in. That mechanism still exists, Your Honor.

And I have mentioned the fact the Court has previously and consistently rejected people whose only explanation was that they just didn't get here in time, when they had notice.

A fourth factor that the Courts have considered in deciding whether to apply Rule 7023 is whether the application of Rule 23 would deter future wrongdoing. Obviously in liquidation, there's no future wrongdoing to be

deterred, so that doesn't help.

A fifth factor the Courts have considered is whether application of Rule 23 would frustrate the expeditious administration of assets. That's actually particularly important here, Your Honor, because one of the things that is happening is that as these claims are reclassified, reserves are opened up, and there's going to be a distribution as the Court mentioned normally at the end of September, it'll be the first of October because of the dates this year.

The -- at this far -- at this point, Your Honor, and this can be determined by -- as we noted in our class response by looking at the claims and adding them up, a number of claims would be reclassified and should be reclassified we believe today, Your Honor, including those who had to file their response on the same day the class motion was filed. So they certainly could not have relied on the class motion in any way. And those claims will be almost $100 million of reserves.

If the class were certified one of the consequences is that $100 million reserves has to be held and not distributed, not considered in the distribution that's coming up. So it will reduce everybody's distribution some. So the idea that this will gum up the works is very real here. This class motion would gum up the works on that

distribution.

A sixth factor the Courts have considered in deciding whether to apply Rule 7023 is whether application of Rule 23 would show a benefit to the class that justifies the cost to the estate, and therefore to the other claimants of defending the class action.

Mr. Schager referred to the Ephedra case. I think the Court well noted in that case that quote, the only real beneficiaries of applying Rule 23 would be the lawyers representing the class, close quote. We believe that's the only real consequence here, is that there will be a claim for legal fees on behalf of these class representatives, that otherwise would not be available.

And here, because we have consented to nine claimants joining the punitive class, by representative's response, the numbers have changed a little by the way in our response, Your Honor, and I want to clarify that because we've consented to another person. Eighty-five percent of the class members whose claims were subject to the 313th or 319th omnibus objection failed to respond. So the vast majority of punitive class members have -- would be reclassified as equity interests.

Class certification should also be denied, Your Honor, even if you decided to apply Rule 7023 which the reasons you've set forth, we think you should not exercise

your discretion to do because it just doesn't meet the requirements of Rule 23.

There are four basic requirements, they have the burden of proving each of those requirements. There's an issue on the numerosity I don't think the Court needs to turn on numerosity. The -- those who have filed responses as opposed to those who have not, if you count them in the numerosity, it's actually probably less than 40. But if you take the people who have not filed responses yet, then numerosity is probably satisfied.

But typicality cannot be satisfied because when you -- you have to take subclasses, and you have the subclasses of those who did respond and those who didn't respond. And the class representatives are people who did respond and they are not typical, and they don't have the same interests as those in the class who did not respond. And that has to do with adequacy, the next requirement Rule 23(a)(4), the representative parties will fairly and adequately protect the interests of the class.

And a key point is whether there is a conflict of interest. There is a conflict of interest between those who responded, even if they only sent a one line letter, and they joined the litigation, and those who did not respond. And there is no one here who did not respond who can speak for them. Mr. Schager is saying, he's going to have people

who did respond actually take actions to reduce albeit, a small amount, their potential pot, if they recover by helping those who didn't respond. So adequacy cannot be met, and that undermines the requirements of that branch of the rule in 23(a).

The elements of 23(b) also have not been satisfied. 23(b)(1) is limited to cases seeking injunctive relief, not claims for monetary damages. These are claims for monetary relief. That's what this is all about. There's no declaratory judgment, there's no injunction.

23(b)(3), which is the subhead that would apply has a superiority requirement. And it also has a predominance requirement. We certainly agree that there are -- there is some commonality of issues between these parties, that's clear. But as the Court's pointed out, that commonality is one of the reasons why this is not superior.

Law of the case will take care of the resolution of the legal issues. And it's not necessary to create a class to deal with that in some different way.

In general, the Bankruptcy Code and bankruptcy rules provide the same benefits and serve the same purposes as class action procedures in normal civil litigation. And we cite in support of that, Your Honor, the In Re Woodward and Loafer Holdings, Inc. (ph), a case which notes, quote, a bankruptcy proceeding offers the same procedural advantages

as a class action, because it concentrates all of the disputes in one forum, which was the same point you made before, Your Honor, in one of your transcript rulings.

And in many respects, the bankruptcy proceeding is superior. The Court need not certify a class because for -- from efficient management, because we have the procedures order that we've already presented to the Court, and we have the separation which the Court has talked about between the 3,100 claimants who have been dealt with we believe fairly under bankruptcy procedures, and those -- this subgroup that Mr. Schager would put in a completely different category and deal with it in a different way.

There's really not a response to the superiority argument in the reply, and I didn't hear one from Mr. Schager. The reply simply says, "adjudicating individual claims would consume judicial resources and would be impractical." In fact, it's not going to consume additional resources or be impractical. What will consume additional resources is to have to go through a class notice and the other procedures that are required by Rule 23.

Finally, Your Honor, under the third major test, class certification would be inconsistent with the goals of bankruptcy. This would add layers of procedural complexity. The Northwest Airlines Corporation case is a good example of a case in which a Court concluded that it was particularly

inappropriate post confirmation to deal with a class in the post confirmation era. The Court had already confirmed a reorganization plan there. And here, LBHI has already made initial plan distribution to holders of over 12,000 claims and class status would delay that process for $100 million worth of reserves.

The -- there are really no cases that claimants cite from this district, other than cases involving joint motions for settlement purposes only, or where the class action device has been found to be superior in a bankruptcy context that is anything comparable to this.

For all these independent reasons, Your Honor, we believe that a class certification is unnecessary and inappropriate, and would actually be destructive to the orderly administration of the case, and ask that the class motion be denied.

THE COURT: Is there anything more?

MR. SCHAGER: Your Honor, may I address two brief points?

THE COURT: Sure.

MR. SCHAGER: I beg your pardon. The Ephedra Twin Labs case, Your Honor, and the Woodward and Lothrop (ph) cases, I just would say very briefly that those were both cases where the class certification motion was made at a much later time in the proceeding than this one.

And I've given the reasons, I think a lot of the reasons why class certification is not used in bankruptcy might have been considered if we'd made our motion with the 130th omnibus objection. But I think, you know, I've done my best to give Your Honor the facts. I think the facts warrant a different view at this point. And I recognize the skepticism with which bankruptcy courts address class certification motions, but I think it's warranted here by the facts that we've submitted about inadequacy of notice and the -- both in terms of mailing and substance.

In terms of typicality, you know, these are all -- as defense counsel or debtor's counsel concedes, these are all claims for monetary relief. The fact that someone had the resources to stand up and say, I'm willing to represent those who don't have the resources does not put him in a conflict position. It's almost implicit here, and it's actually referenced in one of the opening paragraphs of the debtor's brief that it's suggesting that there's a pie that's being offered here to the class representatives if they don't proceed a class basis. And that's clearly not what's happening here. And it clearly disregards the whole economic analysis of why class actions proceed in this context.

Of course, I recognize that typically in a class action, you have a class complaint. That's not the

circumstances of where we are now. And every class member would have an opportunity to opt out, that's always the case in class action practice. No one's being locked into anything if really do not want to proceed. So there's no basis for saying that these claims are not typical.

It's paragraph three of the brief, Your Honor, that says that claims could potentially recover more if the defaulting class members are not included. I -- you know, there's -- you don't have to cut the pie in so many slices, but there's no pie offered here. And the economics are that going ahead on a class-wide basis is what justifies the class action.

The suggestion, Your Honor, that somehow counsel would benefit if the class does not, I've expressed my view of that in the papers. It's clearly inappropriate.

And finally, the point that this is going to gum up the works because there's $100,000 -- a $100 million in reserves, well the whole point, Your Honor, of course, is the $100 million ought to go to the right people. And if we don't have a class certification here, some of the deserving people are not going to get their fair share of it.

I appreciate your patience, Your Honor, thank you.

THE COURT: Okay. I've given this matter quite a lot of thought, not only during the argument, but in preparation for it, and I've read the papers. Additionally,

there is a very significant recent case of the United States Court of Appeals for the Fourth Circuit that no one cited, but that I reviewed with some care as well. It's the Fourth Circuit's decision arising out of the Circuit City Store bankruptcy case. The case is Gentry versus Segal, that's Alfred H. Segal in his capacity as trustee of the Circuit City Stores Liquidating Trust.

The case is probably now the leading circuit authority on class actions in the context of a bankruptcy claims process. And is particularly instructive in dealing with the interplay of Civil Rule 23, which governs class action practice and Rule 9014 that might under certain circumstances apply Rule 23 to contested matters, as opposed to adversary proceedings.

Nobody spent any time today in argument discussing the setting in which this arises, which is somewhat unusual, in that it is arising in the context of a contested matter or series of contested matters rather than in the context of an adversary proceeding. I really don't need to get into that, however.

What the Circuit City decision effectively does is to discount the various technical arguments made by Lehman in reference to the application of Rule 23 in a contested matter. I'm not going to discuss the case except for one sentence that I think is a significant guiding principle.

"Each bankruptcy case must be assessed on a case-by-case basis to determine whether allowing a class action to proceed would be superior to using the bankruptcy claims' process." That appears on page 7 of the LexisNexis site. I can't tell you off the top of my head what the correct cite would be in its regular reporter, but the case is cited at 668 F.3d 83.

The point of the sentence is instructive for me in this case. The question beyond technicalities is whether allowing a class action to proceed would be superior to the claims process applicable in the particular bankruptcy case that's being administered by the Court.

Here it is clear to me that the claims process itself is superior to any class action, and indeed, the very order that I have just agreed to enter in reference to discovery procedures in connection with omnibus objections to the reclassification of proofs of claim as equity interests makes clear that the claims administration process is sufficiently flexible and advanced at this point, to permit those individuals that have lodged objections to the omnibus objections of the debtor may proceed in the ordinary course to deal with their claims.

Additionally for reasons that I am emphasized during my colloquy with counsel, to grant the class certification motion at this late stage of the process leads

to a series of distortions in the treatment of similarly situated creditors, it simply isn't justified or appropriate.

We are in the midst of a claims allowance and classification process in the largest bankruptcy case in the history of the United States. The claims process has consumed already an enormous amount of judicial resources and legal resources. And without yet being in a position to assess the success of the process, in some respects, the events of this year demonstrate that the process has worked well and continues to work well.

Those events include the initial distribution to creditors that took place in the first quarter, and the next distribution that is scheduled to take place at the beginning of October. To the best of my recollection, as of the bar date, and these are round numbers, something in excess of $1.2 trillion in claims were filed against these estates. That's an extraordinary number. Completely unmanageable and filled with duplication and inappropriate claims that needed to be weeded out. The claims process has run its course, not yet to the point of conclusion, and has succeeded in eliminating inappropriate claims.

It remains to be determined whether the RSU and CSA claims that are the subject of ongoing litigation will or will not be included for purposes of future distributions.

But as to those claimants that have chosen not to object, one thing is clear, they are not participating in distributions that have been made or will be made in the future.

That represents a final determination based on the decision not to contest the omnibus objections. To grant class certification in a manner that would allow parties that have not contested the omnibus objections to get the same benefits as those individuals who have chosen to object, would simply be unfair. There's no justification for it. And it would raise serious questions as to the fairness of treatment throughout this entire process.

The motion is denied substantially for the reasons set forth in the papers that were filed by Lehman and for the reasons discussed in these remarks from the bench. I will entertain an appropriate order.

MR. MILLER: Thank you, Your Honor, we will do so. Do you want to move on to the next agenda item or it appears Mr. Schager may want to say something.

MR. SCHAGER: No, I just wanted to thank His Honor for his patience.

MR. MILLER: The next agenda item will be handled by Mr. Bernstein, Your Honor.

THE COURT: Okay.

MR. BERNSTEIN: Mark Bernstein from Weil again, on

behalf of LBHI. Your Honor, the last two items on the agenda are the 313th and 319th omnibus objections. We are seeking to go forward today on only an uncontested basis for those claimants that did not reply. We did receive some late replies as Mr. Miller references, eight on behalf of Mr. Schager's clients, and one on behalf of Ms. Solomon's clients. We are adjourning those and deeming those timely filed, and we're only going forward with claimants for which no response was received.

I did receive just a moment ago, someone handed to me in the courtroom, a letter signed by -- and I'm going to butcher the name, but Virgilio Kosupole, II (ph), and that he did not have time to reply to the objection because he's out of town, and this is his response.

This creditor is not on either the 313th or 319th omnibus objections at all. I'm not exactly sure what this relates to. I'm happy to talk to this creditor after the hearing, but this has no bearing on the request to enter the 313th and 319th on an uncontested basis.

THE COURT: The 313 and 319 omnibus objections are granted on an uncontested basis with the understanding that the letter just described does not apply to either of those objections.

MR. KOSUPOLE: Your Honor, may I requested for permission to speak because I was the person who --

THE COURT: You'll have to come forward so that you can be heard.

MR. KOSUPOLE: Good morning, Your Honor. I'm Virgilio Kosupole. I'm a former Lehman employee and I'm representing -- one of those claimants, RSU claimants like 5 to 10,000 claims, Your Honor, and I took my half day off to attend this hearing because I receive a letter from the LBHI attorneys on August 8, but I was out of town. And I only have a -- I wasn't able to file the opposition deadline on August 16, but I'm here today, Your Honor, to oppose the objection for the motion to reclassify my -- the asset equity, the -- I was opposing the objection for to classify the proof of claims as equity under this bankruptcy hearing, Your Honor.

THE COURT: Mr. Bernstein, can you at least identify what this relates to?

MR. BERNSTEIN: I'm not really able to from the letter. The August 16th deadline that he refers to was the deadline for responding to the procedures, the discovery procedures motion. So I can guess that's maybe the papers that he received. But just from this, I don't know.

THE COURT: Well, I'm going to suggest that since you're here, and you took half a day off, that you use the opportunity of being with counsel for the debtor to at least identify, if you can, what this all relates to and make sure

that your objection is timely lodged against whatever claim you're trying to protect. I don't know what it relates to yet.

MR. BERNSTEIN: To the extent he has filed a response to a prior objection he's -- it'll be adjourned like all other responses we've received. To the extent he's on a prior objection for an order that has already been entered --

THE COURT: Then we'll have to deal with.

MR. BERNSTEIN: -- we'll have to deal with it.

THE COURT: Okay.

MR. BERNSTEIN: That's all we have on the agenda for today.

Okay. So the motion that he does have is the motion to establish the procedures, so not a motion seeking to expunge his claims. So this was a response to that. I can speak with this creditor afterwards and explain it.

THE COURT: Fine. What this tends to demonstrate, however, is that there is an ample opportunity for confusion when legal documents are sent to both lawyers and non-lawyers. And hopefully as we move forward with the discovery procedures that have been approved, that the parties will be able, especially dealing with pro se claimants to make those procedures as understandable and user friendly as possible.

MR. BERNSTEIN: Sure.

THE COURT: All right. We're adjourned for today.

MR. BERNSTEIN: Thank you, Your Honor.

(Whereupon, the proceedings concluded at 11:51 AM)

R U L I N G S

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Debtor's Three Hundred Twenty-First Omnibus Objection to claims	15	6

R U L I N G S, CONTD.

DESCRIPTION	PAGE	LINE
Motion to establish and implement procedures in connection with omnibus objections to reclassify proofs of claim as equity interests with proposed order establishing discovery procedures in connection with omnibus objections to reclassify proofs of claim as equity interests	29	13
Motion to certify a class of RSU and CSA claimants, appoint class counsel and class representatives and approve the form and manner of notice	65	23
Three Hundred Thirteenth Omnibus Objection to claims (to reclassify proofs of claim as equity interests)	70	20
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C E R T I F I C A T I O N

I, Sheila G. Orms, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: August 24, 2012

Shelia G. Orms

Digitally signed by Shelia G. Orms
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